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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

vs.

THE HONORABLE WILLIAM CARTER GRIDLEY, PAULA HAWKINS, W.E. HAWKINS, COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED FOR REVIEW

Whether the First Amendment is violated by a *per se* rule permanently denying the press and public access to unfiled discovery materials in civil cases, where no protective order based upon good cause has been entered.

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceeding before the Florida Supreme Court:

Petitioners

The Miami Herald Publishing Company, an unincorporated division of Knight-Ridder, Inc.

Sentinel Communications Company

Florida Publishing Company

Respondents

The Honorable William Carter Gridley

Paula Hawkins

W.E. Hawkins

Cowles Broadcasting, Inc.

Channel Two Television Company of Florida

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner The Miami Herald Publishing Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in the above proceeding.

OPINIONS IN THE COURTS BELOW

The opinion of the Supreme Court of Florida in *Miami Herald Publishing Co. v. Gridley* (*"Gridley"*) appears at 510 So.2d 884 (Fla. 1987), and is reprinted in the appendix, A. 2-3. The opinion of the Fifth District Court of Appeal in *Sentinel Communications Co. v. Gridley* appears at 496 So.2d 259 (Fla. 5th Dist. Ct. App. 1986), and is reprinted in the appendix, A. 5-6. The order entered by the Circuit Court of the Ninth Judicial Circuit in *Hawkins v. Cowles Broadcasting, Inc.* has not been reported. It is reprinted in the appendix, A. 7-8.

JURISDICTION

The opinion of the Supreme Court of Florida in *Gridley* was entered on July 2, 1987. A Motion for Rehearing was timely filed on July 17, 1987, which motion was denied by the Supreme Court of Florida on September 3, 1987. On November 21, 1987, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including January 1, 1988. Subsequently, on December 24, 1987, Justice Stevens ordered that the time for filing a petition for writ of certiorari be extended to and including January 16, 1988. This petition has been filed and docketed within the period established by Supreme Court Rule 29.1. The Court has jurisdiction to review the judgment of the Supreme Court of Florida under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provisions and rules involved are:

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 1.280(c), Florida Rules of Civil Procedure:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are

just, order that any party or person provide or permit discovery. The provisions of Rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

Rule 1.310(f), Florida Rules of Civil Procedure:

(3) A copy of a deposition may be filed only:

(A) By a party or the witness when the contents of the deposition must be considered by the court on any matter pending before the court. Prompt notice of the filing of the deposition shall be given to all parties unless notice is waived. A party filing the deposition shall furnish a copy of the deposition or the part being filed to other parties unless the party already has a copy.

(B) If the court determines that a deposition previously taken is necessary for the decision of a matter pending before the court, the court may order that a copy be filed by any party at the initial cost of the party.

Rule 1.350(d), Florida Rules of Civil Procedure:

(d) Filing of Documents. Unless required by the court, a party shall not file any of the documents or things produced with the response. Documents or things may be filed when they should be considered by the court in determining a matter pending before the court.

STATEMENT OF THE CASE

Introduction

Approximately 92% of all civil cases litigated in Florida's courts conclude without having proceeded to

public trial.[1] Consequently, Florida's system of civil justice, like the federal system on which it is modeled, is primarily a pretrial process, and press access to that process is essential for the public to understand and monitor its workings.

Since few Florida civil cases proceed to trial, journalists for *The Miami Herald* have come to depend heavily on the sworn testimony and evidence adduced during the pretrial process to report fully and accurately on civil litigation of legitimate public concern.[2] This reliance on deposition testimony proceeded for years largely

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1. According to figures provided by the Florida Supreme Court Summary Reporting Service and compiled by the State Court Administrative Office, in recent years, 8% or fewer of all civil cases filed in the circuit courts of Florida culminated in trial. Thus, in 1986, of 300,181 cases disposed of, only 24,840 culminated in trial. Likewise, in the first half of 1987, of 154,388 cases, only 9,796 (6%) were disposed of by trial. Some additional percentage, not recorded by the state, presumably concluding *during* trial.

2. Prior to *Palm Beach Newspapers, Inc. v. Burk*, 471 So.2d 571 (Fla. 4th Dist. Ct. App. 1985), *aff'd*, 504 So.2d 378 1987), Florida trial judges repeatedly had held that members of the press enjoyed a qualified right to both attend depositions taken in civil cases and inspect transcripts. *See, e.g., Withlacoochee v. Seminole Electric*, 1 Fla. Supp. 2d 1377, 8 Media L. Rep. 1281 (BNA) (Fla. 13th Cir. Ct. March 11, 1982) (Miller, J.); *Cazarez v. Church of Scientology*, 6 Media L. Rep. 2109 (BNA) (Fla. 6th Cir. Ct. Oct. 31, 1980) (Bryson, J.); *Johnson v. Broward County*, 7 Media L. Rep. 2125 (BNA) (Fla. 17th Cir. Ct. Oct. 22, 1981). Criminal depositions were likewise presumed open in Florida prior to *Burk*. *Florida v. O'Dowd*, 9 Media L. Rep. 2455 (BNA) (Fla. 18th Cir. Ct. Oct. 13, 1983) (Mize, J.); *Florida v. Tolmie*, 9 Media L. Rep. 1407 (BNA) (Fla. 15th Cir. Ct. March 3, 1983) (Cook, J.); *Florida v. Reid*, 8 Media L. Rep. 1249 (BNA) (Fla. 15th Cir. Ct. March 8, 1982) (Goldman, J.); *Florida v. Sanchez*, 7 Media L. Rep. 2338 (BNA) (Fla. 15th Cir. Ct. Nov. 17, 1981) (Mounts, J.); *Florida v. Hodges*, 7 Media L. Rep. 2424 (BNA) (Fla. 20th Cir. Ct. Dec. 21, 1981) (Pack, J.); *Florida v. Alford*, 5 Media L. Rep. 2054 (BNA) (Fla. 15th Cir. Ct. Oct. 19, 1979) (Mounts, J.); *Florida v. Diggs*, 5 Media L. Rep. 2597 (BNA) (Fla. 11th Cir. Ct. March 4, 1980) (Nesbitt, J.); *Florida v. Bundy*, 48 Fla. Supp. 205 (Fla. 2d Cir. Ct. Apr. 26, 1979) (Cowart, J.).

without comment or moment[3] because transcripts were routinely filed in the public court file pursuant to both practice and the rules. It was not until Florida's adoption of new "housekeeping" rules, designed to "relieve the document storage burden" which all courts began to experience in the last decade, that parties no longer filed discovery responses and deposition transcripts as a matter of course.[4]

While the filing rules were never intended to diminish substantive public access rights, they have had just this consequence in Florida. In fact, as the case at bar amply demonstrates, these rules have provided the opportunity for civil litigants to control and limit public knowledge of particular litigation and of the judicial process, even when that litigation involves a public official, is a matter of fundamental public concern, and no sound basis for such limitation is even asserted.

United States Senator Paula Hawkins' Personal Injury Lawsuit and Her Bid for Reelection

On January 5, 1982, Paula Hawkins ("Hawkins" or the "Senator"), then a United States Senator, injured her

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3. Throughout this period, only three cases involving deposition access reached the Florida appellate courts, and each affirmed the qualified right to monitor the deposition process. *See Ocala Star Banner Corp. v. Sturgis*, 388 So.2d 1367 (Fla. 5th DCA 1980); *Sentinel Star Co. v. Booth*, 372 So.2d 100(Fla. 2d DCA 1979); *Tallahassee Democrat, Inc. v. Willis*, 370 So.2d 867 (Fla. 1st DCA 1979).

4. *See In re Florida Rules of Civil Procedure*, 403 So.2d 926, 930 (Fla. 1981) (adopting Rule 1.310(f) to restrict the filing requirement "in an effort to relieve the document storage burden now experienced by all segments of Florida's court system"); *see also* Rule 5(d), Federal Rules of Civil Procedure, Notes of Advisory Committee, 1980 Amendment ("large volume of discovery filings presents serious problems of storage . . . but such materials are sometimes of interest to those who may have no access to them except by a requirement of filing").

back in an accident at WESH Channel Two in Orlando, Florida. Approximately four years later, Hawkins and her husband filed a lawsuit against the television station claiming that the accident was due to the station's negligence. The Senator's complaint, itself a public judicial record, alleged the accident caused her to suffer an injury which became a physical handicap impairing her ability to work:

> Plaintiff Paula Hawkins was injured in and about her body and extremities, suffered pain thereupon, incurred medical expenses in the treatment of said injuries, *suffered physical handicap and her working ability was impaired; said injuries are either permanent or continuing in nature and plaintiff will suffer such loss and impairment in the future.*

A. 12 (emphasis added). In order to test the validity of the Senator's public allegations, the defendants commenced discovery. Depositions were taken and interrogatories propounded and answered. The state of the Senator's health was one of the central issues in the personal injury lawsuit.

At the same time Hawkins was prosecuting this civil action for impairment of "her working ability," she continued in her role as United States Senator and actively sought reelection. As a result of the allegations raised by the Senator in the pending lawsuit, her health also became a major issue in the campaign. Throughout, Hawkins maintained that she was physically fit to hold office and that her ability to fulfill her duties as a United States Senator was not in any way impaired. She denied repeated press requests for any information regarding her condition or injury.

The Motion for Access

The health and physical fitness of a candidate for high public office is always a matter of legitimate public concern. In the Senator's case, as Election Day neared, the clear conflict between her professed legal position regarding her health and her campaign promises was cause for even greater concern. Accordingly, the press (including *The Miami Herald*) moved for access to those deposition transcripts and interrogatory answers in the Senator's lawsuit (the "Records") which directly related to her fitness to serve a second term in the United States Senate. A. 9-20. Timeliness of access, although always important in news reporting, was particularly urgent since the fall election campaign was nearly over.

In the motion requesting access, the press explained that access to the Records would provide information highly relevant to the public's assessment of the Senator's fitness to hold office. Had the Records revealed the Senator to be seriously incapacitated, that information would surely bear on the electorate's judgment of her fitness to hold office.

In addition, since the Senator had steadfastly claimed in her campaign that she was healthy, any documents indicating she was impaired would have reflected on her character for truthfulness and fitness to hold office. If, in contrast, the Records had shown the Senator was healthy, but had nonetheless filed a lawsuit claiming that she was not, access to the Records would also bear directly on her character for truthfulness. Thus, whatever the Records might have revealed, they were clearly of great public interest on the eve of the general election.

The press advanced three legal grounds for public access to the Records. The Florida and federal rules of procedure, the common law, and the First Amendment all made the Records presumptively open to the public. Thus, only a showing of "good cause" or the most compelling reasons could justify limiting access to the Records. Since Hawkins could demonstrate no compelling reason or cause for closure, particularly given her status as a candidate for reelection to the United States Senate, the Records should be open to the public.

Hawkins' response was twofold. First, she argued that the press had no standing to intervene in her lawsuit simply to seek access. Second, she argued that the public had no right to inspect the Records in her "private" personal injury lawsuit. Relying primarily on this Court's decision in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), and *Sentinel Communications Co. v. Smith,* 493 So.2d 1048 (Fla. 5th Dist. Ct. App. 1986), Hawkins contended that the public enjoyed no common law or constitutional right of access to the Records and that her position as a candidate and public official did not alter the legal status of the Records. Claiming only that the release of the Records would constitute an invasion of her privacy, Hawkins made no attempt to demonstrate why the Records should not be released. In the alternative, Hawkins requested that she be given the opportunity to seek a protective order based upon "good cause" to limit access to the Records.

After hearing argument, the trial court held that the press had standing to intervene but denied the motion for access, stating:

> This trial court considers itself bound by the appellate decision of *Palm Beach Newspapers, Inc. v. Burk,* 471 So.2d 571 (Fla. 4th DCA 1985) which denied such access in an extensive and thorough en banc opinion and also certified this very issue to the Florida Supreme Court as being a question of great public importance. This issue is presently pending before the Florida Supreme Court.

A. 8.[5]

The Emergency Appeal

The press immediately sought emergency review of the order of the trial court. The following day, without hearing oral argument, the Fifth District Court of Appeal summarily affirmed the order of the trial court and denied the petition filed by the press:

> Based upon the *Palm Beach* case and the prior opinion of this court in *Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980), we deny the petition. *See also Seattle Times Corp. v. Rhinehart,* 467 U.S. 20 (1984).

A. 6. In addition, the Fifth District certified the following question to the Florida Supreme Court as a matter of great public importance:

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5. In *Palm Beach Newspapers, Inc. v. Burk,* 471 So.2d 571 (Fla. 4th Dist. Ct. App. 1985), *aff'd,* 504 So.2d 378 (Fla. 1987), the Fourth District Court of Appeal, sitting *en banc,* held 5-4 that the public and press enjoyed no right of access to criminal depositions. *Burk* was pending in the Florida Supreme Court on certified question when the trial court and district court of appeal rendered their decisions in this case. The lower *Gridley* courts simply ignored the conflicting 7-2 *en banc* decision of Florida's Third District Court of Appeal although it too was then pending before the Florida Supreme Court on certified question. *Estrada v. Snyder,* Case No. 86-767 (Fla. 3d Dist. Ct. App. 1986), *jurisdiction declined sub nom. Miami Herald Publishing Co. v. Estrada,* No. 68,625 (Fla. 1987).

Are unfiled discovery materials in a civil case accessible to the public and hence to the press?

A. 6.

The Decision of the Florida Supreme Court

The Florida Supreme Court, like the Fifth District Court of Appeal, summarily affirmed the order of the trial court. Relying on its recent decision in *Palm Beach Newspapers, Inc. v. Burk,* in which it held the public enjoyed no right of access to unfiled deposition transcripts in criminal cases, and on this Court's decision in *Seattle Times Co. v. Rhinehart,* the court stated:

> We recognize, of course, that our decision in *Burk* dealt with this issue in the context of criminal proceedings. However, the rationale employed in *Burk* leads us to the same conclusion here concerning the right of access in civil proceedings. We point out that in *Burk* we relied upon *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which was a civil case, in finding no right of access.

A. 3. The court extended the bright line rule announced for criminal cases in *Burk* to civil proceedings and held that the public could be denied access to unfiled discovery materials irrespective of whether any cause, let alone "good cause," existed for the denial of access. *Id.* Thus, as a consequence of an interpretation of a decision of this Court, crucial information concerning Florida's civil justice system is now routinely withdrawn from public scrutiny without any party having to make the slightest showing of the propriety of such secrecy.

REASONS FOR GRANTING THE WRIT

I.

Three years ago, in *Seattle Times Co. v. Rhinehart,* this Court first addressed the relationship between First Amendment rights and court rules authorizing protective orders restricting *civil litigants'* dissemination of information obtained solely through the use of judicial discovery procedures. The decision wrought a careful balancing of the state's interest in preventing discovery abuses and facilitating the efficient litigation of civil disputes on one hand, and the free speech interests of litigants on the other.

The Court was careful to note that the protective order under review had been entered for "good cause," in accordance with the state rules of procedure. The plaintiff Aquarian Foundation had made a strong evidentiary showing that the protective order should be entered to preserve the anonymity, and thereby the important privacy and First Amendment rights, of its members and contributors. Filed affidavits showed that the unpopularity of the Aquarian sect had subjected known members to vandalism and retaliation for their beliefs. The trial court permitted discovery into these matters, but found "good cause" to limit the defendant's right to disclose this highly protected information obtained solely through the judicial process. This Court concluded that court rules providing for such protective orders upon a showing of "good cause" do not violate the First Amendment because they serve a substantial governmental interest unrelated to the suppression of speech and are appropriately tailored to protect that interest.

In the years since *Seattle Times*, the state and lower federal courts have attempted to apply its teachings in a variety of contexts, many of which are far removed from the narrow case of gratuitous disclosure of highly protected confidential information obtained by a civil litigant through court-ordered discovery. The cases very frequently involve the *public's* right to monitor civil litigation and understand our system of civil and criminal justice rather than a *party's* self-interested desire to disseminate irrelevant information obtained through discovery.

More technical distinctions are also found in the cases. Access claims may involve either filed or unfiled materials, and the access right may be asserted either post-judgment or pre-judgment. *See, e.g., In re Reporters' Committee for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) (no First Amendment right of access *prejudgment* to civil discovery documents filed with the court). The grounds recognized for the qualified access right have included the common law, court rules, state constitutional provisions, and the First Amendment.

Efforts to apply *Seattle Times* to these cases have been problematic since the case did not involve a public access claim. *See Reporters' Committee*, 773 F.2d at 1331 (*Seattle Times* is "more remote in that it did not invoke a claim by the public to *access*, but rather a claim by one of the parties to *disseminate* information acquired in the course of pretrial discovery") (Scalia, J.). The materials which were the subject of the protective order in *Seattle Times* were not filed with the court, and the right to disseminate them at will was restricted prior to entry of judgment.

The Florida Supreme Court's opinion is the most far-reaching limitation of the public's First Amendment right

of access to be based on *Seattle Times*. The Florida Court explicitly relied on its recent holding in *Palm Beach Newspapers, Inc. v. Burk*, in which the court held that the public enjoyed no right of access to unfiled deposition transcripts in *criminal* cases. In extending its *Burk* holding to the *civil* case at bar, the court stated:

> We point out that in *Burk* we relied upon *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which was a civil case, in finding no right of access.

A. 3. And, in *Burk*, the Florida court squarely held that its "conclusion that the press does not have a first amendment right . . . to obtain copies of depositions which are not filed with the court finds support in *Seattle Times Co. v. Rhinehart*." 504 So.2d at 382 (citation omitted). Relying on *Seattle Times* to "[furnish] guidance," *id.*, the Florida Supreme Court in *Burk* and now *Gridley* has held that the press and public have absolutely no right of access to unfiled deposition transcripts, irrespective of whether "good cause" for closure is alleged (much less shown), whether any party objects to the denial of public access, or even whether judgment has been entered in the case. In short, the Florida court expressly attributed its expansive holding to the opinion of this Court in *Seattle Times*.

The crux of the *Burk* opinion, which provided the basis for the decision below, is the Florida court's assertion that as a *party litigant*, the Seattle Times was allowed discovery into the Aquarian Foundation's confidential information, but that "as a *newspaper*, the Seattle Times was treated as a non-party to the suit and had no independent constitutional right to have access to the discovery process." 504 So.2d at 382.

The flaws in this reading of *Seattle Times* are apparent. This Court's opinion nowhere states or implies that the press and public have no right to monitor the civil discovery process, and it nowhere holds or suggests that the Seattle Times' rights were solely those of a litigant. The order affirmed in *Seattle Times,* by its express terms, *did not limit public access to information relevant to litigation of the case.* The Court's careful balancing of litigants' interests has been converted by the Florida court into a *per se* rule of closure which finds no support in the actual language of the opinion, and is clearly contrary to its rationale. The *per se Burk/Gridley* closure rule, unlimited in scope or duration, serves no interest unrelated to the suppression of speech and is not narrowly drawn to serve a substantial governmental interest.

If the *Burk/Gridley* rule were the isolated decision of a single state court, guidance from the Court on this issue would be of "great public importance" only to the people of Florida. However, the Florida rule has been explicitly followed by the highest state courts of both Michigan and Arizona. *Booth Newspapers, Inc. v. Midland Circuit Judge,* 145 Mich.App. 396, 377 N.W.2d 868 (Mich. Ct. App. 1985), *leave to appeal denied,* 425 Mich. 854 (Mich. 1986), *cert. denied,* 107 S.Ct. 877 (1987) (no standing); *Lewis R. Pyle Memorial Hospital v. Superior Court,* 149 Ariz. 193, 717 P.2d 872, 876 (Ariz. 1986) (citing *Burk*). And the position of these courts is analogous to that of the Tenth Circuit Court of Appeals which has held the press has no standing to seek access to unfiled civil discovery materials. *Oklahoma Hospital Association v. Oklahoma Publishing Co.,* 748 F.2d 1421 (10th Cir. 1984), *cert. denied,* 473 U.S. 905 (1985).

These decisions, however, conflict with opinions of many other important appellate tribunals. At least seven United States Courts of Appeals have construed *Seattle Times* to hold that third parties do enjoy a qualified access right to discovery materials, a right which may be overcome only by a showing of "good cause." Some of these cases involve the public's right to monitor some of the most important "public law" cases of this era. *Courier-Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987) (holding that First Amendment associational rights constitute "good cause" to seal deposition testimony); *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987) (requiring "good cause" to maintain seal on civil discovery documents designated "confidential" pursuant to blanket protective order in Vietnam veterans' suit for injuries caused by "Agent Orange" chemicals); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352 (11th Cir. 1987) (requiring "good cause" to prevent press access to unfiled discovery documents in suit concerning massive fraud by government securities broker); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986) (requiring "good cause" to seal civil discovery documents submitted to the court in support of motions in toxic waste case); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (requiring "good cause" to seal non-confidential civil discovery documents in products liability case against tobacco companies); *Worrell Newspapers v. Westhafer*, 739 F.2d 1219, 1223 n.4 (7th Cir. 1984) (reciting that *Seattle Times* permits the entry of a protective order for "good cause" shown in the context of pretrial civil discovery); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172-73 (D.C. Cir. 1984) (remanding for determination of whether the continua-

tion post-judgment of a protective order sealing deposition transcripts is supported by "good cause"); *see also United States v. Smith*, 602 F.Supp. 388 (M.D. Pa. 1985), *aff'd*, 776 F.2d 1104 (3d Cir. 1985) (requiring "good cause" to restrict public access to a bill of particulars deemed to be criminal discovery); *State v. Cianci*, 496 A.2d 139, 144-45 (R.I. 1985) (recognizing a First Amendment right of access to discovery materials produced in a state criminal prosecution). *See generally*, D. Paul, R. Ovelmen, L. Besvinick and F. Burt, "Access," in 3 *Communications Law 1987*, 224-26, 285-88 (PLI 1987).

In fact, journalists in Florida face this conflict squarely every day in trying to cover judicial proceedings in the state and federal courts. As a consequence of the decisions of the Eleventh Circuit in *Alexander Grant* and the Florida Supreme Court in *Burk* and in the case at bar, the press enjoys a qualified right of access to discovery materials produced in *federal* court, but no similar right in *state* civil or criminal actions.

This Court can provide critically needed guidance on the application of *Seattle Times* to third party access claims and in so doing resolve the conflicts among the many cases addressing the public's right to monitor the discovery process.

II.

In a series of decisions culminating in *Press-Enterprise II*,[6] this Court has developed the contours of a qual-

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6. *Press-Enterprise Co. v. Superior Court*, 106 S.Ct. 2735 (1986) (*"Press-Enterprise II"*); *Waller v. Georgia*, 467 U.S. 39 (1984); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*"Press-Enterprise I"*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. Depasquale*, 443 U.S. 368 (1979).

ified First Amendment right of access to criminal prosecutions. The Court has never squarely decided whether the First Amendment access right applies to civil trials or other phases of the civil justice process. Yet the Court's access decisions imply that the public also enjoys a qualified right of access to civil trials, pretrial proceedings and documents. Several Justices have suggested as much in *dicta*.[7] This case presents a compelling opportunity to address this issue and provide much needed guidance to the bench, bar, and press. The Court should endorse the approach taken by numerous federal appellate courts and hold that the First Amendment access right encompasses civil proceedings and documents.[8]

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7. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 516 (1984) (Stevens, J., concurring) ("distinction between trials and other official proceedings is not necessarily dispositive or even important, in evaluating the First Amendment issues"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) ("historically both civil and criminal trials have been presumptively open"); *Gannett Co. v. Depasquale*, 443 U.S. 368, 386 n.15 (1979) ("For many centuries, both civil as well as criminal trials have traditionally been open to the public.").

8. This Court recognized that a civil trial is "a public event" over forty years ago. *Craig v. Harney*, 331 U.S. 367, 374 (1947). Today at least *seven* Courts of Appeals have recognized some First Amendment right of access to civil proceedings. *E.g., Anderson v. Cryovac, supra* (recognizing limited First Amendment interest in access to unfiled civil discovery materials); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34 (C.D. Cal.), *aff'd*, 10 Media L. Rep. (BNA) 2430 (9th Cir.), *cert. dismissed*, 105 S.Ct. 768 (1984) (recognizing First Amendment right of access to documents filed during pretrial civil proceedings); *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 3478 (1985) (recognizing First Amendment right to attend civil trials); *Publicker Industries v. Cohen*, 733 F.2d 1059, 1069-70 (3d Cir. 1984) (recognizing First Amendment right of access to civil trials); *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (recognizing First Amendment right of access to pretrial civil proceedings and evidence

(Continued on following page)

In considering whether the First Amendment right of access applies to particular judicial records or proceedings, this Court has looked to two complementary considerations. "First, because a tradition of accessibility implies the favorable judgment of experience," the Court has "considered whether the place and process has been open to the press and general public." *Press-Enterprise II*, 106 S.Ct. at 2740. Second, the Court has "considered whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

The Florida Supreme Court addressed neither issue, instead relying solely on *Seattle Times* and its earlier decision in *Burk*, in which the court also failed to address the issues. Thus, that Florida *never had* a rule against public access to civil depositions and discovery materials, that the press had actually attended many such depositions since the inception of the discovery rules, and that materials filed by the parties had been presumptively open to the public, were facts of no import to the court.[9]

Footnote continued—

introduced therein); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (recognizing First Amendment right of access to documents introduced in civil proceeding); *see also Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (recognizing First Amendment right of access to civil trials relating to prison conditions and prisoner release).

9. Whether discovery proceedings have historically been closed to the public is an issue that deserves far greater attention from this Court. Substantial historical evidence exists that depositions under the common law, although rare, did occur and were open to the public at the discretion of the presiding magistrate or "Examiner," not of the parties. Daniell, *Chancery Pleading and Practice*, Vol. I, 906 (6th Am. Ed. 1894) ("The Examiner has power to admit or exclude the public, as he thinks fit."); *Wright v. Wilkin*, 4 Jur.N.S. 804, 805 (1885) ("As to the public or the short-hand writer, I think the examiner has power to do just as he thinks fit; if he imagines that he is precluded

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Similarly, the court never considered the structural importance of public access to the civil discovery process. Such access is crucial for the public to understand Florida's largely pretrial judicial system, a system in which fewer than 92% of all cases culminate in a public trial. The court offered no assessment of the need for pretrial access in these cases, or of the public benefit that access to the discovery process would provide. Consequently, the Florida court departed from this Court's access tenets in at least two fundamental ways.[10]

First, it is clear that each of the First Amendment interests supporting access to criminal trials identified by this Court in *Richmond Newspapers, Inc. v. Virginia*, 448

Footnote continued—

from admitting any persons except the parties, their legal advisers, and the witnesses, I think he is not right."). The Daniell treatise was followed in the leading Florida treatise on the subject. R.H. Armstrong and W.P. Donahue, *Florida Chancery Jurisprudence* § 334 (1927) ("The examination of witnesses may be conducted in public or private, as the officer may determine."). By statutory mandate, Florida courts of the period were required to observe English practice where, as here, Florida and federal rules were silent. Act of Nov. 7, 1828, § 35 (1881); *Long v. Anderson*, 48 Fla. 27, 37 So. 216, 219 (1904).

But see Reporters' Committee, supra.

10. In addition, the *Burk/Gridley* rule as applied to criminal cases raises serious Sixth Amendment concerns. As the Court noted in *Press-Enterprise II*, "[t]he right to an open trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II*, 106 S.Ct. at 1740; *see Waller v. Georgia, supra.* It is at this juncture that the Sixth Amendment rights of the criminal defendant and the First Amendment rights of the public are coextensive. The *Waller* Court observed that the need for open suppression hearings "may be particularly strong" because "[a] challenge to the seizure of evidence frequently attacks the conduct of police and prosecutor." 467 U.S. at 47. The *Burk/Gridley* rule, because it grants the prosecution the power to close an unfiled deposition even when the defendant objects, thus presents a clear threat to the fundamental constitutional rights of both criminal defendants and the public.

U.S. 555 (1980), applies with equal force to access to unfiled discovery materials in Florida's largely pretrial system of civil justice. Each of the interests served by access to trials—"fairness," "the perception of fairness," "public understanding of the rule of law" and the case at hand, "the community therapeutic value" of observing the process, the deterrence of wrongdoing, and the communication of information relevant to informed discussion of the system; *id.* at 570-73—is served by access to discovery material. Indeed, the interests served by access to trials can *only* be served by access to such material in Florida, since depositions and other discovery often provide the only meaningful avenue of public access to the process. As this Court recognized in relation to California's preliminary hearing in *Press-Enterprise II*, a procedure which provides "the sole occasion for public observation" of the judicial system must be open to public view. *Press-Enterprise II*, 106 S.Ct. at 2743, *quoting Richmond Newspapers*, 448 U.S. at 572.

Second, the Florida Supreme Court has judicially created a rule against access which is as absolute as the mandatory closure statute invalidated by this Court in *Globe Newspaper Co. v. Superior Court.* This Court has consistently stated that the adjudication of access claims requires a rule which will accommodate competing interests; consequently, *per se* or mandatory closure rules are inappropriate. As the Court noted in *Globe Newspaper, supra,* at 608, even a "compelling" interest "does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." The locus of authority to make decisions regarding access is the trial judge who must articulate specific findings to support closure on a

case-by-case basis; it is not the parties acting in their own narrow self-interest. *Id.* Moreover, particular closure orders must be narrowly tailored to serve compelling or overriding state interests. *Press-Enterprise II,* 106 S.Ct. at 2743; *Press-Enterprise I,* 464 U.S. at 510; *Globe Newspaper,* 457 U.S. at 606-07.

The *Burk/Gridley* rule satisfies none of these requirements. It is an absolute *per se* rule which does not permit the accommodation of competing interests. The traditional authority of the trial court to decide public access claims is replaced by the whim of a single party. No compelling state interest was presented to justify the imposition of this *per se* closure rule. That *some* depositions or discovery materials may contain private information does not justify a rule that seals *all* unfiled depositions and discovery materials irrespective of whether they contain any sensitive information.

CONCLUSION

Whether considered in light of *Seattle Times* or this Court's First Amendment access cases, the decision of the Florida Supreme Court is in error and signals the widespread need for guidance by this Court. The issue of public access to unfiled discovery materials was certified to the Florida Supreme Court for resolution because it was a matter of "great public importance" to the people of Florida. The number and variety of courts to have considered the same issue demonstrates that its importance is nationwide. Likewise, the fact that the Florida rule has been both followed and contradicted in state and federal courts across the country shows that the issue is ripe

for this Court's resolution. Finally, the extraordinary result of the rule adopted by the Florida court was to deny the public access to information directly pertaining to the fitness for office of a candidate for reelection to the United States Senate on the eve of the election. In light of the significance of this issue, and the pronounced conflicts among the circuits in deciding it, we respectfully submit that this Petition for a Writ of Certiorari be granted.

DATED: Miami, Florida
January 15, 1988

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served January 15, 1988, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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I further certify that all parties required to be served have been served.

GERALD B. COPE, JR.

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Motion of The Miami Herald Publishing Company and the Florida Publishing Company for Leave to Intervene and for Access to Discovery Materials and Memorandum of Law in Support Thereof (October 28, 1986)

MIAMI HERALD PUBLISHING COMPANY, et al.,
Petitioners,

v.

Honorable William Carter GRIDLEY,
Judge, et al., Respondents.

No. 69684.

Supreme Court of Florida.

July 2, 1987.

Rehearing Denied Sept. 3, 1987.

The District Court of Appeal, 496 So.2d 259, certified question. The Supreme Court, Ehrlich, J., held that unfiled discovery materials in civil case are not accessible to public and press.

Certified question answered in negative.

Barkett, J., concurred in result only.

* * *

EHRLICH, Justice.

We have for our review *Sentinel Communications Co. v. Gridley,* 496 So.2d 259, 260 (Fla. 5th DCA 1986), wherein the district court certified the following question of great public importance:

> ARE UNFILED DISCOVERY MATERIALS IN A CIVIL CASE ACCESSIBLE TO THE PUBLIC AND HENCE TO THE PRESS?

We have jurisdiction, article V, section 3(b)(4). Florida Constitution, and answer this question in the negative

based on our recent decision in *Palm Beach Newspapers v. Burk*, 504 So.2d 378 (Fla.1987).

We recognize, of course, that our decision in *Burk* dealt with this issue in the context of criminal proceedings. However, the rationale employed in *Burk* leads us to the same conclusion here concerning the right of access in civil proceedings. We point out that in *Burk* we relied upon *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which was a civil case, in finding no right of access.

Accordingly, we answer the certified question in the negative and approve the decision of the district court below.

It is so ordered.

McDONALD, C.J., and OVERTON, SHAW, GRIMES and KOGAN, JJ., concur.

BARKETT, J., concurs in result only.

SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 3, 1987

CASE NO. 69,684

MIAMI HERALD PUBLISHING CO., etc., et al.,
Petitioners,

v.

WILLIAM CARTER GRIDLEY, et al.,
Respondents.

District Court of Appeal, 5th District - No. 86-1893

Upon consideration of the Motion for Rehearing filed in the above cause by attorneys for Petitioner, The Miami Herald Publishing Company, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied.

McDONALD, OVERTON, EHRLICH, SHAW, GRIMES and KOGAN, JJ., concur BARKETT, J., dissents

SENTINEL COMMUNICATIONS COMPANY, The Miami Herald Publishing Company, a division of Knight-Ridder, Inc., and The Florida Publishing Company, Petitioners,

v.

Honorable William Carter GRIDLEY, Paula Hawkins, W.E. Hawkins, Cowles Broadcasting, Inc., and Channel Two Television Co. of Florida, Respondents.

No. 86-1893.

District Court of Appeal of Florida,
Fifth District.

Oct. 31, 1986.

Petition to Review Order Excluding the Press A Case of Original Jurisdiction.

* * *

PER CURIAM.

The petitioners seek review pursuant to Florida Rule of Appellate Procedure 9.100(d) of an order entered October 30, 1986, by the Honorable William C. Gridley, denying them access to *unfiled* discovery materials. The trial court relied on the case of *Palm Beach Newspapers, Inc. v. Burk*, 471 So.2d 571 (Fla. 4th DCA 1985). The petitioners do not controvert the finding of Judge Gridley that the requested materials have not been filed of record in the circuit court.

Based upon the *Palm Beach* case and the prior opinion of this court in *Ocala Star Banner Corp. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980), we deny the petition. *See also Seattle Times Corp. v. Rhinehart,* 467 U.S. 20, 104 S.Ct. 2119, 81 L.Ed.2d 17 (1984). Pursuant to Florida Rules of Appellate Procedure 9.125 and 9.030(a)(2)(B), we certify the following question to the Florida Supreme Court as a question of great public importance:

> ARE UNFILED DISCOVERY MATERIALS IN A CIVIL CASE ACCESSIBLE TO THE PUBLIC AND HENCE TO THE PRESS?

DENIED.

UPCHURCH, C.J., and ORFINGER and COBB, JJ. concur.

IN THE CIRCUIT COURT
ORANGE COUNTY, FLORIDA

CASE NO. 86-41

PAUL HAWKINS and W. E. Hawkins,
her husband,
Plaintiffs

vs.

COWLES BROADCASTING, INC., and CHANNEL TWO TELEVISION COMPANY OF FLORIDA,
Defendants

ORDER ON MOTION TO INTERVENE AND TO COMPEL ACCESS TO DISCOVERY MATERIALS

This matter came on before the Court on October 29, 1986 on Motion to Intervene and to Compel Access to Discovery Materials filed by The Sentinel Communications Company, L. John Haile, The Miami Herald Publishing Company and Florida Publishing Company. The Court heard argument of counsel for each of the parties and after full review of the file and case law, it is thereupon

ORDERED AND ADJUDGED as follows:

1. Apart from the Florida Rules of Civil Procedure, which do not appear to encompass or contemplate the situation presented herein, the "Intervenors" do have standing to raise the issues herein before this Court. See *Sentinel Star Company v. Edwards,* 387 So2d 367 (Fla.

5th DCA 1980) where a similar matter was raised by an ore tenus motion before the trial judge.

2. The "Intervenors" ' Motion to Compel Access to unfiled discovery materials is denied. This trial Court considers itself bound by the appellate decision of *Palm Beach Newspapers, Inc. v. Burk,* 471 So2d 571 (Fla. 4th DCA 1985) which denied such access in an extensive and thorough en banc opinion and also certified this very issue to the Florida Supreme Court as being a question of great public importance. This issue is presently pending before the Florida Supreme Court.

DONE AND ORDERED in Chambers at Orlando, Florida this 30th day of October, 1986.

/s/ William C. Gridley
William C. Gridley, Circuit Judge

IN THE CIRCUIT COURT OF THE
9TH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

CASE NO. CI-86-41

PAUL A. HAWKINS, and W. E. HAWKINS,
Plaintiffs,

v.

COWLES BROADCASTING INC. and CHANNEL TWO
TELEVISION CO. of Florida,
Defendants.

Florida Bar Number 160643

MOTION OF THE MIAMI HERALD PUBLISHING COMPANY AND FLORIDA PUBLISHING COMPANY FOR LEAVE TO INTERVENE AND FOR ACCESS TO DISCOVERY MATERIALS AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Pursuant to Rule 1.230, Florida Rules of Civil Procedure, The Miami Herald Publishing Company, a division of Knight-Ridder Inc., and Florida Publishing Company, publisher of the Florida Times Union, move for leave to intervene in this action for the limited purpose of obtaining access to deposition transcripts and other discovery materials (collectively "the Records") directly relating to the fitness of Plaintiff United States Senator Paula Hawkins to serve another term in the Senate of

the United States and for access to the Records. The grounds for this motion are:

1. This suit is not an ordinary personal injury suit. In this case, the plaintiff is a United States Senator. The fitness of a United States Senator to hold office is always a matter of great public concern. That concern is particularly urgent where, as here, a Senator is seeking reelection for an additional six year term. The discovery documents at issue are relevant to Senator Hawkins' fitness to serve in two fundamental ways. First, if the Records show she is seriously incapacitated, either by her injury or the medication she requires because of it, they are relevant to her *physical* fitness to hold office. Second, the Senator has repeatedly asserted during the campaign that she has no health problems which could affect her ability to perform her duties as a United States Senator. If the Records show that she has such health problems, they are germane to her truthfulness and consequently the fitness of her character to hold public office. For these reasons, the public has a right to know the facts contained in the Records before deciding whether to vote for Senator Hawkins' reelection. If the Records show the Senator is in good health and has no such disability, she can have no basis for opposing public access to these documents.[1]

2. Discovery materials produced in accordance with the Florida Rules of Civil Procedure are presumptively open to the public and may be sequestered from public

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1. If the Records show the Senator is not incapacitated but has nonetheless filed a lawsuit claiming that she is, access to the records is still directly relevant to her truthfulness and the fitness of her character for public office.

view only by entry of a protective order based upon "good cause" shown. Rule 1.280(c), Fla.R.Civ.P. No "good cause" to limit access to the Records exists.

3. The Records sought here are an integral part of the litigation process and are therefore presumptively open to the public under Florida's common law. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982); *State ex rel. Miami Herald Publishing Co. v. Mcintosh*, 340 So.2d 904 (Fla. 1977); *Goldberg v. Johnson*, 485 So.2d 1386 (Fla. 4th DCA 1986); *Sentinel Star Co. v. Edwards*, 387 So.2d 367 (Fla. 5th DCA 1980). In order to overcome the common law presumption of access, the Senator must show (1) that closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) that no less restrictive alternative is available, and (3) that closure will achieve the court's purpose. *Miami Herald Publishing Co. v. Lewis, supra*, at 6; *Goldberg v. Johnson, supra*, at 1389. There are no compelling reasons to deny access under Florida's common law test for closure.

4. The qualified First Amendment right of public access to the judicial process applies with full force to civil litigation, because there is both a history of access to civil materials and access to them serves a critical role in the democratic system. *Press-Enterprise Co. v. Superior Court*, ... U.S. ....., 106 S.Ct. 2735 (1986) (*"Press-Enterprise II"*); *In re Coordinated Pretrial Procedings In Petroleum Products Antitrust Litigation*, ... F.2d ....., 10 Media L.Rep. (BNA) 2430 (9th Cir. 1984), *cert. dismissed*, 105 S.Ct. 768 (1984). Under the First Amendment, access may be denied only after proof of

an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II, supra,* 106 S.Ct. at 2741. No such interest is present here.

MEMORANDUM OF LAW

In paragraph 7 of her Amended Complaint For Damages, Senator Hawkins alleges she is suffering and will continue to suffer an injury which has become a physical handicap impairing her ability to work:

> . . . Plaintiff Paula Hawkins was injured in and about her body and extremeties, suffered pain thereupon, incurred medical expenses in the treatment of said injuries, *suffered physical handicap and her working ability was impaired; said injuries are either permanent or continuing in nature and plaintiff will suffer such losses and impairment in the future.* (emphasis added).

Similar allegations are made in paragraph 8 of the Amended Complaint.

The possible impairment of the ability of a United States Senator to perform her work is always of the greatest public concern, but this concern assumes particular urgency when that Senator is in the process of running for re-election. The Records sought here relate directly to the ability of Paula Hawkins to continue in her position as a United States Senator. Clearly, the legitimate public interest in the Records could not be greater, nor the reasons for granting access more compelling.

ARGUMENT

I. ACCESS TO THE RECORDS MUST BE GRANTED BECAUSE SENATOR HAWKINS CANNOT SHOW "GOOD CAUSE" UNDER THE FLORIDA RULES OF CIVIL PROCEDURE FOR RESTRICTING ACCESS

The Florida Rules of Civil Procedure unequivocally state that a party seeking to restrict public access to depositions and discovery materials must make a showing of "good cause" to justify the restriction:

> Upon motion by a party . . . and for good cause shown, the court . . . may make an order . . . (5) that discovery be conducted with no one present except persons designated by the Court, (6) that a deposition after being sealed be opened only by order of the Court; (7) that a trade secret or other confidential research development, or commercial information not be disclosed or be disclosed only in a designated way, (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened by the Court.

Rule 1.280(c), Fla.R.Civ.P. Except for the Fourth District, every appellate court to have considered the issue has concluded that public access to pretrial depositions and discovery materials can be restricted only upon a showing of "good cause." As the Fifth District held in an opinion binding on this Court:

> We therefore conclude that the press does not have an absolute right to attend the taking of a deposition, that its presence may be regulated by the court under Rule 1.280(c)."

Ocala Star Banner Corp. v. Sturgis, 388 So.2d 1367, 1371 (Fla. 5th DCA 1980). *Accord Miami Herald Publishing Co. v. Estrada,* ..... So.2d ....., (Fla. 3d DCA 1986) (*en banc*) (slip opinion), *app. pending,* Case No. 68, 624 (Fla. 1986); *Short v. Gaylord Broadcasting Co.,* 462 So.2d 591 (Fla. 2d DCA 1985); *Tallahassee Democrat, Inc. v. Willis,* 370 So.2d 867 (Fla. 1st DCA 1979); *Sentinel Star Co. v. Booth,* 372 So.2d 100 (Fla. 2d DCA 1979). *But see Palm Beach Newspapers v. Burk,* 471 So.2d 571 (Fla. 4th DCA 1985) (*en banc*), *app. pending* Case No. 67,352 (Fla. 1986).

Senator Hawkins has claimed in her lawsuit that she has suffered a "permanent or continuing" "physical handicap" which has "impaired" her "working ability." Amended Complaint, ¶7. There can be no "good cause" to keep from the voting public the Records which bear directly on the alleged "handicap" of a candidate for re-election to the United States Senate. Access must be granted.

II. ACCESS TO THE RECORDS MUST BE GRANTED BECAUSE SENATOR HAWKINS CANNOT OVERCOME FLORIDA'S COMMON LAW PRESUMPTION OF ACCESS TO CIVIL DISCOVERY RECORDS AND PROCEEDINGS

There is no question that the Florida common law presumption of public access applies to civil cases. The Florida Supreme Court has so stated in *State ex rel. Miami Herald Publishing Co. v. McIntosh,* 340 So.2d 904, 908 (Fla. 1977):

> [T]he public and press have a right to know what goes on in a courtroom whether the proceeding be criminal or civil.

The Fifth District has likewise held the common law right of access applies to civil proceedings. *Sentinel Star Co. v. Edwards,* 387 So.2d 367, 374 (Fla. 5th DCA 1980) (post-trial hearing relating to juror interviews in a wrongful death action) ("The press and public had a common law right of access to the hearing."). Other Florida appellate courts have uniformly applied the right of access to civil proceedings, absent special circumstances.[2] *Goldberg v. Johnson,* 485 So.2d 1386 (Fla. 4th DCA 1986); *State ex rel. Gore Newspapers Co. v. Tyson,* 313 So.2d 777, 783 (Fla. 4th DCA 1975), *overruled on other grounds, English v. McCrary,* 348 So.2d 293 (Fla. 1977)

Florida has adopted a three-part test for denying public access to deposition transcripts and other civil discovery proceedings and records. The general "good cause" standard for protective orders under the Florida Rules of Civil Procedure[3] must be construed consistently with this common law standard. A movant seeking to exclude the public from civil discovery materials must therefore show:

1) the measure limiting or denying access (closure or sealing of records or both) is necessary to prevent a serious and imminent threat to the administration

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2. The recent decision in *Sentinel Communications Co. v. Smith* ..... So.2d ....., 11 F.L.W. 1484 (Fla. 5th DCA 1985) involves a litigant's asserted right of privacy in a divorce proceeding and is thus inapposite for at least two reasons. First, this is not a divorce case. Second, there can be no privacy claim here since, by her decision to run for re-election, the Senator has made her health a public issue. *Jacova v. Southern Radio & Television Co.,* 83 So.2d 34 (Fla. 1955).

3. Federal cases concur that the common law presumption of access applies to civil discovery materials. *Nixon v. Warner Communications, Inc.,* 435 U.S. at 597-98; *In re Coordinated Pretrial Proceedings, supra.*

of justice; 2) no less restrictive alternative measures are available which would mitigate the danger; and 3) the measure being considered will in fact achieve the court's protective purpose.

Goldberg v. Johnson, supra, at 1389 (unsealing civil guardianship proceedings). *Accord Sentinel Star Co. v. Booth, supra* (criminal depositions). *See also Miami Herald Publishing Co. v. Lewis, supra.* Senator Hawkins cannot satisfy any part of this rigorous standard.

III. ACCESS TO THE RECORDS MUST BE GRANTED BECAUSE SENATOR HAWKINS CANNOT SHOW THAT CLOSURE IS ESSENTIAL TO PRESERVE HIGHER VALUES, AS REQUIRED BY THE FIRST AMENDMENT

The United States Supreme Court has recognized a qualified First Amendment right of public access to judicial proceedings. *Press-Enterprise II, supra; Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). This right clearly extends to civil discovery proceedings. *Press-Enterprises II,* 106 S.Ct. at 2740 ("[T]he First Amendment question cannot be resolved solely on the label we give an event, *i.e.,* "trial" or otherwise."); *Press-Enterprise I, supra* (Stevens, J. concurring); *Richmond Newspapers Inc. v. Virginia,* 448 U.S. at 580 n. 17 (1980); *In re Coordinated Pretrial Proceedings, supra; Westmoreland v. C.B.S.,* 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Industries v. Cohen,* 733 F.2d 1059 (3d Cir. 1984); *In the Matter of Continental Illinois Securities Litigation,* 732 F.2d 1302 (7th Cir. 1984); *Brown and Williamson Tobacco Corp. v. F.T.C.,* 710 F.2d

1165 (6th Cir. 1983); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982).

In determining whether the First Amendment right of access applies to particular proceedings or records, courts must look to two considerations:

> [f]irst, . . . whether the place and process has historically been open to the press and general public . . . [and] [s]econd, . . . whether public access plays a significant positive role in the functioning of the particular process in question.

Press-Enterprise II, 106 S.Ct. at 2740 (citation omitted).

Both considerations support access here. First, there is a tradition of access. The rules of procedure historically required parties to place deposition transcripts and discovery documents in the open court file.[4] Second, public access in this case serves fundamental societal interests. The Records offer the voting public the unique opportunity to evaluate the fitness for office of a United States Senator running for re-election, as well as the

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4. That discovery materials and dispositions no longer are required to be filed is of no legal consequence because the change in the rules was strictly a "housekeeping" rule enacted "in an effort to relieve the document storage burden now experienced by all segments of Florida's court system." *In re Florida Rules of Civil Procedure*, 403 So.2d 926 (Fla. 1981). Florida courts retain the power to order the material to be filed. Rule 1.310(f) & Rule 1.350(d), Fla.R.Civ.P.

The comments to the parallel federal rules make it clear that third parties continue to enjoy a right of access to discovery materials even if the materials are unfiled. *See* Rule 5(d), Fed.R.Civ.P.; Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 622-23 (1978) ("It is intended that the Court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c)."); *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 567 (E.D.N.Y. 1985).

chance to observe her behavior in her own civil tort action.

Although the First Amendment right of access is *qualified*, not *absolute*, "[i]t may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise II*, 106 S.Ct. at 2741, *quoting Press-Enterprise I*, *supra* at 510. This interest must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* Senator Hawkins has no "overriding interest" sufficient to overcome the intense public interest in the Records relating to the elective and judicial processes at issue in this case.

CONCLUSION

For the foregoing reasons, this Court should permit intervention and grant access to the Records.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion Of The Miami Herald Publishing Company and Florida Publishing Company For Leave To Intervene And For Access To Discovery Materials And Memorandum Of Law In Support Thereof was served by hand *before noon* on October 28, 1986, upon the following:

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